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No. 89-930

In the Supreme Court of the United States

OCTOBER TERM, 1989

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, PETITIONER

v.

GENERAL RAILWAY SIGNAL COMPANY, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY MEMORANDUM FOR THE PETITIONER

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Respondent's brief in opposition devotes *not one word* to defending the reasoning of the D.C. Circuit in this case. The questions presented are whether the D.C. Circuit correctly held (1) that the phrase "equitable adjustment" in the WMATA-GRS contract provides for prejudgment interest and (2) that the phrase is a sufficient waiver of sovereign immunity. The D.C. Circuit unambiguously "base[d] [its] conclusion on the contract between WMATA and GRS." Pet. App. 13a. It held that:

> The "Changes" clause of that contract * * * authorizes "equitable adjustments" in cases like this. *This term* imports *into the contract* a doctrine mandating a make-whole remedy that will restore a contractor to the contractor's pre-change circumstances. * * * Thus, in agreeing

> wholly to compensate GRS or any costs sustained as a result of modifications in the work it wanted performed, WMATA *waived* its immunity from prejudgment interest * * *.

Id. at 13a-14a (emphasis added).

On the first question presented, however, respondent makes no effort to defend the proposition that an "equitable adjustment" clause in this contract provides for prejudgment interest under District of Columbia law. Respondent advances only the markedly different proposition that WMATA is liable for prejudgment interest in cases of *breach* of contract. Br. in Opp. 6-7. Whatever validity that theory may or may not have, it has nothing to do with this case, which involved an adjustment under the contract and not a breach of contract. Respondent's effort to call this case a "breach" case contradicts the governing District of Columbia precedent every bit as much as does the D.C. Circuit's reasoning.

On the second question presented, respondent makes no effort to defend the proposition that the language "equitable adjustment" waives sovereign immunity against prejudgment interest. Respondent advances only the markedly different proposition that WMATA has no sovereign immunity to begin with in this case. Br. in Opp. 8-11. Not only is that proposition incorrect; it contradicts the very opinion that respondent purports to defend.

1. Respondent all but admits that *District of Columbia* v. *C.J. Langenfelder & Son*, 558 A.2d 1155 (D.C. 1989), compels the conclusion that a "changes" or "equitable adjustment" clause of a WMATA contract entered into before the mid-1970s does not provide for prejudgment interest. See Br. in Opp. 5-6

& n.6. Respondent could hardly do otherwise, since the *Langenfelder* court explicitly rejected the contrary conclusion of the D.C. Circuit in this case. 558 A.2d at 1163. It is readily apparent, therefore, that the proper disposition of this case is to grant the petition, vacate the judgment of the D.C. Circuit, and remand for further consideration in light of *Langenfelder*. See Pet. 11-14 (collecting cases).

Respondent's sole effort to circumvent *Langenfelder* is a thin one indeed. Respondent asserts that this case "is not an 'arising under' case, but a case of breach." Br. in Opp. 6. Respondent backs that assertion with a contention that the D.C. Circuit "found [an] independent bas[i]s for the award of prejudgment interest" in "WMATA's breach of th[e] contract." *Id.* at 7. The D.C. Circuit, however, did not advance any such independent basis for its award of prejudgment interest, and if it had done so it would only have placed itself further in conflict with *Langenfelder*.

The D.C. Circuit made reference to this as a "breach" case *not* in the portion of its opinion dealing with whether prejudgment interest should be awarded, but only in the portion dealing with the *rate* of prejudgment interest and the *date* from which it should accrue. Pet. App. 15a-20a. Because D.C. Code § 15-109 refers to "an action to recover damages for breach of contract," the D.C. Circuit had to consider whether this was such a case *within the meaning of that statute*. The D.C. Circuit answered that question in the affirmative, because "Section 15-109 expressly refers only to 'action[s] to recover for breach of contract,' but it has been applied to a suit for accounting which, 'although not framed as a breach of contract action, was based on a contractual relationship between the

parties.'" Pet. App. 17a (citations omitted). Thus, as the court below recognized, actions *under the contract* are treated as "breach" cases for the limited purposes of Section 15-109. As *Langenfelder* conclusively demonstrates, the purposes for which actions under the contract are treated as "breach" cases do not include the determination whether to award prejudgment interest at all.

If the D.C. Circuit *had* called this a "breach" case, that would be more reason, not less, for a remand for further consideration in light of *Langenfelder*. For *Langenfelder* itself makes it clear that an "equitable adjustment" case—which this case indisputably is—is not a breach case:

> "When the contract makes provision for equitable adjustment of particular claims, such claims may be regarded as converted from breach of contract claims to claims for relief under the contract." In cases arising under the contract, the contract itself governs the method and scope of relief available.

Langenfelder, 558 A.2d at 1159 (citations omitted) (quoting *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 404 n.6 (1966)). Thus, the supposed alternative holding of the D.C. Circuit, aside from being fictional, would itself be directly contrary to District of Columbia law.

It could not be otherwise. The *sole* basis on which respondent asserts that WMATA "breached" its contract is that WMATA did not pay respondent the "equitable adjustment" that respondent claims was its due under the contract. But *every* case in which the contractor seeks recovery under an "equitable adjustment" clause is one in which the other party allegedly "breached" the contract in the same way, if that con-

stitutes a "breach." Respondent's theory therefore would swallow the *Langenfelder* rule. That cannot be —and demonstrably is not—what the D.C. Court of Appeals intended. As the D.C. Court of Appeals said in so many words (558 A.2d at 1163), the decision below is wrong under District of Columbia law. It should be vacated.

2. Respondent suggests that "WMATA puts its trolley before its horse" by assuming that it has sovereign immunity against prejudgment interest and that the issue in this case is whether the contract waives that sovereign immunity. Br. in Opp. 8. Respondent particularly takes us to task for relying on *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), a case that respondent asserts applies only to the federal government and not to WMATA.

Respondent, however, ignores the express statements in the D.C. Circuit's opinion—the opinion that respondent purports to defend—that WMATA *does* have sovereign immunity in this case unless it was waived, and that *Shaw is* applicable:

> WMATA is an instrumentality of each of the signatories—Maryland, Virginia, and the District of Columbia—to the Compact that created the Authority. As such, *"WMATA's sovereign immunity exists because the signatories have successfully conferred their respective sovereign immunities upon it."* It is well-settled that *a sovereign* is immune from liability for interest unless it has waived its immunity by statute or contract. The Supreme Court has only recently reaffirmed this general proposition. *See Library of Congress* v. *Shaw*, 478 U.S. 310 (1986).

Pet. App. 13a (emphasis added and citations omitted); accord *id.* at 41a (district court opinion)

("Prejudgment interest against a governmental entity like WMATA is allowable only when there is a statutory or contractual waiver of sovereign immunity for such interest."). The D.C. Circuit went on to hold that WMATA had indeed waived its sovereign immunity against prejudgment interest by including an "equitable adjustment" clause in the contract. *Id.* at 13a-14a; accord *id.* at 41a-42a (district court opinion). Our petition challenges that holding, yet respondent's brief in opposition does not (and, under *Shaw*, could not) defend it.

There is no need for this Court to reach respondent's challenge to the D.C. Circuit's holdings that WMATA has sovereign immunity against prejudgment interest in cases of this sort, and that *Shaw* is applicable. If the Court does reach that issue, however, it should reject respondent's argument. The D.C. Circuit correctly held that WMATA has sovereign immunity against prejudgment interest unless it was waived in the contract, and that *Shaw* applies.

Respondent appears to suggest that WMATA has no sovereign immunity of any kind. See Br. in Opp. 8. But respondent offers neither citation nor argument in support of that suggestion. That WMATA is, in general, a governmental entity with sovereign immunity is shown by the decisions below and the authorities cited in the petition at 6 n.2, in particular the well-reasoned opinion of Judge Bork (joined by Judges Wright and Scalia) in *Morris* v. *WMATA*, 781 F.2d 218 (D.C. Cir. 1986). Respondent offers no basis, and there is none, for concluding that WMATA lacks sovereign immunity in general.

Respondent puts forth more seriously the contention that WMATA has waived its sovereign immunity in Section 80 of the WMATA Compact, 80 Stat. 1350,

which provides that "[t]he Authority shall be liable for its contracts" (Br. in Opp. 8-10).[1] Section 80 is, to be sure, a limited waiver of sovereign immunity. *Morris*, 781 F.2d at 221. But the question in this case is not whether WMATA has sovereign immunity against contract actions—no claim of sovereign immunity against this entire action has been advanced—but whether WMATA has sovereign immunity against *prejudgment interest*. As the D.C. Circuit implicitly recognized in this case, and explicitly recognized in the only other case directly addressing the issue, Section 80's general provision waiving sovereign immunity does not automatically waive all sovereign immunity against prejudgment interest in contract actions. See Pet. App. 13a (basing "waiver" conclusion on the contract, not Section 80); *George Hyman Construction Co.* v. *WMATA*, 816 F.2d 753, 759-760 (D.C. Cir. 1987) (rejecting, under Virginia law, the contention that Section 80 waives WMATA's sovereign immunity against prejudgment interest in a contract action). The D.C. Circuit's conclusions on that point are sound, since the established rule, reflected in *Library of Congress* v. *Shaw*, *supra*, is that an award of prejudgment interest requires a *separate* waiver of sovereign immunity.[2]

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[1] Respondent also argues halfheartedly that D.C. Code § 15-109 constitutes a waiver of sovereign immunity against prejudgment interest. Br. in Opp. 9. That section, however, is a general provision applicable to actions for breach of contract generally. It makes no reference whatever to any governmental or sovereign entity. It could not remotely be construed as the kind of express provision that this Court invariably requires before finding a waiver of sovereign immunity.

[2] Respondent does *not* argue that any provision of the Compact other than Section 80 waives WMATA's sovereign

Finally, respondent argues, without citation, that *Shaw* does not apply to this case because WMATA is somehow a different kind of sovereign than is the United States, whose immunity was at issue in *Shaw*. Br. in Opp. 8. There is no basis for that contention. No court has ever held that the "no-interest rule" enforced in *Shaw* is limited to the federal government. The D.C. Circuit in this case, and the First Circuit in two cases, have held that a separate waiver of immunity is always required before prejudgment interest may be awarded against any sovereign. See Pet. App 13a; *WJM, Inc.* v. *Massachusetts Department of Public Welfare*, 840 F.2d 996, 1006 (1st Cir. 1988); *Rogers* v. *Okin*, 821 F.2d 22 (1st Cir. 1987), cert. denied, 484 U.S. 1010 (1988). Likewise, this Court has assumed, without deciding, that States are entitled to the benefit of the *Shaw* rule in actions other than those brought by the federal government. *West Virginia* v. *United States*, 479 U.S. 305, 311-312 & n.4 (1987). Thus, all extant authority is contrary to respondent's unsupported asser-

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immunity in this case. In particular, respondent does not advance the argument, rejected by the D.C. Circuit in *Morris*, 781 F.2d at 221-222 n.3, that Section 12(a) of the Compact, 80 Stat. 1328, waives WMATA's sovereign immunity by allowing it to "[s]ue and be sued." There are, to be sure, circumstances in which a "sue and be sued" clause operates as a waiver of sovereign immunity. See *Loeffler* v. *Frank*, 108 S. Ct. 1965 (1988). But see *Florida Department of Health & Rehabilitative Services* v. *Florida Nursing Home Association*, 450 U.S. 147 (1981) (per curiam). Whether a "sue and be sued" clause so operates, however, is a question of legislative intent, and "reliance on the 'sue and be sued' clause would be particularly inappropriate in this case where another section of the Compact, § 80, specifically and expressly delineates the scope of WMATA's consent to be sued." *Morris*, 781 F.2d at 222 n.3.

tion that *Shaw* is limited to cases against the federal government. WMATA, as an entity with sovereign immunity (*Morris* v. *WMATA*, *supra*), is entitled to the benefit of *Shaw*'s rule precluding prejudgment interest in the absence of an express waiver of immunity *against interest*. There is no such waiver in this case, and the D.C. Circuit's ruling allowing prejudgment interest directly contradicts *Shaw*.

For the foregoing reasons and those given in the petition, the petition for a writ of certiorari should be granted, the judgment below should be vacated, and the case should be remanded for further consideration in light of *Langenfelder*. In the alternative, the petition for a writ of certiorari should be granted, and the case should be set for full briefing and argument.

Respectfully submitted.

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